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No. 92-844

In The

Supreme Court of the United States

October Term, 1992

OWENS-CORNING FIBERGLAS CORPORATION,

Petitioner,

v.

LEONARD ADAMS, et al.,

Respondents.

Petition For A Writ Of Certiorari To The Circuit Court of Monongalia County, West Virginia

RESPONSE TO PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Should a defendant be permitted to challenge an award of punitive damages on grounds that it allegedly violated the Due Process Clause of the Fourteenth Amendment when:

(a) the defendant was offered, but declined, the opportunity to present all relevant evidence;

(b) the defendant filed objections and exceptions to the courts' charge to the jury, but the objections and exceptions raised no constitutional issues and did not offer more specific instructions to address the purported constitutional infirmity;

(c) the defendant does not challenge on appeal the sufficiency of the evidence on punitive damages;

(d) the post-trial oral argument and the trial court rulings from the bench addressed the defendant's contentions, a procedure defendant tries to hide from this Court by failing to order a transcript of the argument; and,

(e) the defendant appealed to the state's highest appellate court, which heard and rejected the arguments after briefing and oral argument.

2. Should a defendant be permitted to raise the issue of whether multiple punitive damage awards exceed the amount necessary for deterrence and punishment when:

QUESTIONS PRESENTED – Continued

(a) the evidence of egregious conduct was sufficient to submit the issue of punitive damages to the jury;

(b) the defendant was offered, but declined, the opportunity to present relevant evidence on this issue;

(c) there was no evidence of record as to the defendant's financial position, the number of victims of its asbestos products, or the amount of any punitive awards actually paid by it for asbestos-related personal injuries; and,

(d) such awards are permitted by state law under the facts presented.

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RULES INVOLVED

West Virginia Rules of Appellate Procedure 3, 4, 4A, 5 and 7 are reprinted in the Respondents' Appendix at 1.

STATEMENT OF THE CASE

This Petition is yet another attempt by an asbestos defendant to have this Court reverse a punitive damages award properly imposed under applicable state law, after availing itself of all procedural protections at a full trial of the merits of its liability to victims of its defective products. The trial court record, as it actually is and not as rewritten by Petitioner Owens-Corning Fiberglas Corporation ("OCF"), amply supports the imposition of punitive damages and leads to the simple conclusion that Petitioner received all the process that was due. Indeed, this Court recently denied a Petition for a Writ of Certiorari by another defendant in the same trial raising the same issues as those raised herein. *Keene Corp. v. Adams*, 61 U.S.L.W. 3352 (U.S. Nov. 9, 1992) (No. 92-359).

As described in the Petition, Respondents brought these cases against the manufacturers and sellers of the asbestos products that caused their personal injury. Thirty-nine (39) cases were consolidated into two groups for trial: the Adams group was tried before Judge Larry V. Starcher, and the Barnes group was tried before Judge Robert V. Stone.

As stated in the Petition, OCF distributed asbestos-containing Kaylo from the early 1950s. In 1958, OCF purchased the manufacturing facilities for Kaylo, and manufactured and sold the product through at least 1972.

Respondents submitted evidence to show that the distribution and sale of Kaylo continued after production ceased. At trial, there was overwhelming evidence justifying the submission of punitive damages to the jury. An internal memorandum dated January 7, 1942 established OCF's knowledge of the medical literature discussing the lung and skin hazards of asbestos. (Pl. Exhibits 3 and 4). In a letter dated August 29, 1945, OCF recognized that asbestos is "the only silicate that has been determined by lung pathologists to involve a lung hazard." (Pl. Exhibit 503). A report dated February 7, 1952 by the Saranac Laboratory and received by OCF stated, "every precaution should be taken to protect workers against inhaling the dust [created by Kaylo]." (Pl. Exhibits 32 and 33). Four years later Dr. Gerrit Schepers, director of the Saranac Laboratory, again informed OCF that asbestos causes cancer and asbestosis. (Pl. Exhibits 501 and 502).

An internal memorandum dated September 17, 1963 stated: "Asbestos (as found in Kaylo) when breathed into the lungs causes asbestosis which often leads to lung cancer." (Pl. Exhibit 5). OCF's knowledge is also established in documents dated 1965 and 1966. (Pl. Exhibits 8 and 9).

By 1966, one OCF official recognized that Kaylo should bear a warning label. (Pl. Exhibit 12). Nonetheless, subsequent documents revealed OCF's "low gear" program to replace asbestos and commitment "to delay this requirement [of a warning label on Kaylo] as long as possible." (Pl. Exhibits 13 and 21). Further, in October of 1973, OCF was still selling its inventory of asbestos-laden Kaylo at bargain rates, even though it had ceased manufacturing the product. (Pl. Exhibit 25).

Dr. Schepers, who studied OCF's Kaylo product at the Saranac Laboratory, testified for a full day concerning the unequivocal information he provided to OCF in 1955-1956 concerning the risk of cancer and lung scarring posed by its asbestos product to employees as well as users of asbestos in the construction trades. (Trial Transcript, Oct. 22, 1990, Vol. IV, pp. 641-54).

OCF correctly points out that the trial courts granted directed verdicts in favor of the defendants in three cases, and the remaining 36 cases went to the jury. Based on the substantial, indeed overwhelming evidence of OCF's actual knowledge of the hazards of asbestos and refusal to warn of those hazards, the trial courts submitted the issue of punitive damages to the jury.

The Petition at 6-7 accurately states the courts' charge on punitive damages. This charge clearly articulates the purpose of punitive damages and the standard of conduct warranting punitive damages. Also, the courts clearly charged that punitives may be awarded only if compensatory damages are awarded and clearly stated that the award of punitives was not obligatory.

Significantly, OCF's Statement of the Case does not discuss OCF's offer of different or more specific instructions. In fact, OCF did file Objections and Exceptions to Judge's Charge to Jury on or about November 19, 1990. (Respondents' Appendix at 9). The sole issue regarding punitive damages preserved in these objections was whether such damages are available against a product manufacturer that introduces some evidence of a warning. The issue of whether OCF warned was hotly contested, and even OCF's evidence showed at best that it

first applied a warning label in December 1966, long after OCF knew of the dangers of its products. OCF did not raise at the trial level the constitutional objections it now advances. Additionally, any argument that Respondents submitted insufficient evidence of punitive damages has been abandoned in the Petition before this Court.

The Petition is also interesting in that OCF argues that in ruling on motions for a directed verdict on punitive damages, the courts' reasons for denying defendants' motions focused solely on the evidence relating to defendants' conduct. That focus was entirely proper given that evidence of defendants' conduct was the only evidence relevant to punitive damages before the trial court, that the evidence of warnings was the only issue that OCF preserved in its objection to the charge, and the complete absence of any evidence from which a fact finder could assess whether any or all punitive damage awards were paid and constituted sufficient deterrence. Even if OCF had "informed the courts that it had been subjected to previous awards of punitive damages," (Petition at 13), OCF never indicates that the trial courts refused to permit OCF to introduce evidence of prior punitive damage awards to be considered in limitation of or mitigation of punitive damages in these cases. OCF even failed to offer evidence post-trial, instead providing "information," thus insuring the trial courts' inability to consider it. In the absence of such evidence, there was, of course, nothing for the jury, the trial courts or the appellate court to consider.

Based on the evidence, the juries in each courtroom awarded compensatory damages to each plaintiff ranging in amounts from $15,000 to $324,000. The two juries

awarded total compensatory damages of $1,846,040 and total punitive damages against OCF of $4,380,000. The jury in Judge Starcher's courtroom awarded punitive damages against Keene Corporation, the other defendant that went to verdict, in an amount of $5,000 per plaintiff. *See* Response to Petition for a Writ of Certiorari at 3-4, *Keene Corp. v. Adams*, No. 92-359 (U.S.). In all of the cases, the compensatory damage awards were substantially reduced by offsets due to plaintiffs' settlements with other defendants, and in nine (9) cases OCF was not required to pay any compensatory damages at all due to offsets.

In light of the feeble record created by OCF at trial despite every opportunity to admit any relevant, admissible evidence, the trial courts simply might have dismissed OCF's belated attempts to reverse the punitive damage awards based on vague constitutional notions unsupported by any evidence. However, the trial courts did not do so. On February 27, 1991, they conducted a hearing on defendants' post-trial motions, and rendered a decision from the bench on each issue raised. The decisions of the trial court do not appear in the printed record ordered by OCF. One can only speculate that OCF never requested a transcript because the trial courts' findings were inconsistent with OCF's contentions.

Thereafter, the trial courts entered judgments in all cases on March 12, 1991. OCF exercised its right to petition to the West Virginia Supreme Court and filed a lengthy petition for appeal on October 30, 1991.[1] On or

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[1] Under W. Va. R. App. P. 3, the period of time for filing a petition for appeal is four months. However, the parties agreed to extend the period to November 1, 1991.

about January 15, 1992, OCF filed a supplement to its petition. In this procedure, OCF had the right to designate any portions of the record relevant to its petition. Respondents filed a brief in opposition. Pursuant to W. Va. R. App. P. 5, OCF as Petitioner, but not Respondents, had an opportunity to present oral argument on the petition. (Respondents' Appendix at 6). Given the lack of a record, it is not surprising that, after oral presentation, the West Virginia Supreme Court of Appeals refused the petition for appeal by Order dated February 5, 1992.

Despite the fact that the period for filing a petition for appeal had expired on November 1, 1991, OCF filed a notice of renewal of its petition for appeal. Pursuant to W. Va. R. App. P. 7, such notice may only be filed within the period of time for filing the original petition. Despite the fact that this notice was out of time, the West Virginia Supreme Court entertained the renewal and on July 21, 1992, refused the petition for appeal.[2] OCF's Petition for a Writ of Certiorari followed.

In short, OCF waived its right to challenge the constitutionality of punitive damages. In the Petition before this Court, OCF does not point to one shred of evidence that it offered to demonstrate that the punitive damages were excessive; OCF never even attempted to present evidence of its net worth or the total amount of satisfied punitive damage awards against it, or of the ratio

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[2] Given that the notice of renewal was untimely, the July 21, 1992 Order was a nullity. OCF should have petitioned for a Writ of Certiorari within 90 days of the February 5, 1992 Order, and having failed to do so, this Court may dismiss OCF's Petition as untimely.

between its net worth and satisfied punitive damage awards. In short, OCF presented no evidence that it had been punished enough.

REASONS FOR DENYING THE WRIT

SUMMARY OF ARGUMENT

OCF's Petition for a Writ of Certiorari presents no issue reviewable by this Court. OCF contends that the award of punitive damages offends due process. However, the awards are low compared to others upheld by courts under identical circumstances. Further, the evidence was sufficient to submit the issue of punitive damages to the jury, the trial courts did not refuse OCF the opportunity to introduce additional evidence in mitigation of punitives, and OCF did not object to the charge to the jury on the grounds now asserted nor did it offer more specific instructions on the constitutional issues.

Moreover, punitive damages are governed by state law. The awards of punitive damages against OCF comport with principles of applicable West Virginia law, and any challenge to the awards on substantive grounds must be rejected.

I. The Petition Presents No Basis Upon Which This Court Can Conclude That The Punitive Damages Assessed Against Petitioner Violated Due Process.

In *Pacific Mutual Life Ins. Co. v. Haslip*, 111 S. Ct. 1032, 1041 (1991), this Court reaffirmed the longstanding principle that punitive damages are a part of traditional state

tort law. *See also Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 255 (1984). OCF recognizes this principle and indeed, except for its discussion of *Haslip* and footnote 4, the entire Petition discusses West Virginia case law.

These cases were tried in West Virginia courts that applied West Virginia law. The West Virginia Supreme Court recently examined its own law regarding punitive damages in *Fleming Landfill v. Garnes*, 186 W. Va. 656, 413 S.E.2d 897 (1991), on remand from *Fleming Landfill v. Garnes*, 111 S. Ct. 2882 (1991),[3] and in *Davis v. Celotex Corp.*, 420 S.E.2d 557 (W. Va. 1992), an asbestos case tried before one of the judges who presided below. Under the pertinent principles expressed in those cases, OCF has failed to present any basis upon which this Court can conclude that the punitive damages assessed against it by the juries in these cases violates due process.

In *Garnes*, the West Virginia Supreme Court advanced the three general criteria for awards of punitive damages expressed by this Court in *Haslip*:

> (1) a reasonable constraint on the jury's discretion; (2) a meaningful and adequate review of the award by the trial court using established procedures; and (3) a meaningful and adequate review by the appellate court.

Garnes, 413 S.E.2d at 907. All these criteria were satisfied.

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[3] The only part of previous West Virginia law expressly overruled in *Garnes* was the part of *Wells v. Smith*, 171 W. Va. 97, 297 S.E.2d 872 (1982), that stands for the proposition that a jury may award punitive damages without finding any compensatories. *Garnes*, 413 S.E.2d at 908. Contrary to the statement in the Petition at 29, *Garnes* did not find the entire system for awarding punitive damages unconstitutional.

With respect to constraint on the jury's discretion, the jury should consider those factors for which it has all of the information necessary to use those factors properly. *Garnes*, 413 S.E.2d at 909. In *Garnes*, the court reversed an award of punitive damages because, in sharp contrast to these cases, the jury awarded substantial punitive damages, but not compensatory damages.

Here, the only evidence before the jury relevant to punitive damages was the evidence of OCF's wrongdoing. The instructions to the jury described the purposes of punitive damages (to punish and deter) and the standard of conduct required for an award of punitive damages (gross fraud, malice, oppression, or wanton, willful or reckless misconduct or criminal indifference to civil obligations affecting the rights of others). OCF does not contend in its Petition that the evidence of egregious conduct was insufficient to submit the issue of punitive damages to the jury, and indeed other appellate courts have ruled similar evidence concerning OCF's wrongdoing sufficient to submit the issue of punitive damages to the jury. *Dunn v. Owens-Corning Fiberglas Corp.*, 774 F. Supp. 929 (D.V.I. 1991), *aff'd in part and vacated in part sub nom., Dunn v. HOVIC*, 1992 W.L. 228875 (Sept. 18, 1992), *rehearing granted and opinion vacated*, 1992 W.L. 274786 (3d Cir. Oct. 8, 1992); *Owens-Corning Fiberglas Corp. v. Watson*, 243 Va. 128, 413 S.E.2d 630 (1992).

The charge to the jury did not instruct the jury to consider other factors, such as the profitability of the defendant's conduct and the financial position of the defendant, for one simple reason: OCF fails to point to any evidence of these other factors or its request for a specific charge of other factors.

Indeed, the instructions given below were not significantly different from the one approved by this Court in *Haslip*. The record, far from showing that the jury "ran wild," demonstrates that the juries were capable of accommodating the parties' interest in rational decision-making and the state's interest in meaningful, individualized assessment. The compensatory damages ranged widely, obviously reflecting the varying degrees of injury suffered by each plaintiff, and the punitive damages differentiated between the egregiousness of OCF's conduct – which the evidence showed considered but failed to place warnings on products of which it had actual knowledge of the hazards – and that of the other defendant who went to verdict.

The fact that the two juries awarded punitive damages in different amounts is hardly a violation of due process. As recognized by Justice Kennedy: "Jury determination of punitive damages has such long and principled recognition as a central part of our system that no further evidence of its essential fairness or rationality ought to be deemed necessary." *Haslip*, 111 S. Ct. at 1055. Some inconsistency of jury results can be expected. However, nonuniformity cannot be equated with constitutional infirmity. "On the contrary, it is the jury's function to make the difficult and uniquely human judgments that defy codification and that 'buil[d] discretion, equity, and flexibility into a legal system.'" *Id.* (Kennedy, J., concurring) (quoting *McClesky v. Kemp*, 481 U.S. 279, 311, *reh'g denied*, 482 U.S. 920 (1987)). Indeed, this issue was recently raised in a Petition for a Writ of Certiorari, properly denied by this Court in *Owens-Illinois, Inc. v. Roby*, 61 U.S.L.W. 3334 (U.S. Nov. 2, 1992) (No. 92-423).

In short, there is nothing patently "wild" about a total of $4,380,000 in punitive damages awarded to 36 plaintiffs when the aggregate compensatory damages were $1,846,040, resulting in less than a 2.4:1 ratio. In *Glasscock v. Armstrong Cork Co.*, 946 F.2d 1085 (5th Cir. 1991), *cert. denied sub nom., Celotex Corp. v. Glasscock*, 112 S. Ct. 1778 (1992), this Court denied review of a $6.1 million punitive damage award to eleven (11) asbestos plaintiffs, who were awarded total compensatory damages of $2,590,000. In other contexts, this Court has upheld ratios of punitive damages to compensatories more disparate than the ratio presented here. *See, e.g., Haslip* (punitive damages more than four times the compensatory damages); *Browning-Ferris Indus. of Vermont, Inc. v. Kelco Disposal, Inc.*, 492 U.S. 257 (1989) (punitive damages over one hundred times the compensatory damages); *Silkwood* (punitive damages twenty times the compensatory damages).

OCF's failure to present relevant evidence and to preserve the issues it now raises in its Objections and Exceptions to Judge's Charge to Jury, cannot be rectified in this Court. *See Simpson v. Pittsburgh Corning Corp.*, 901 F.2d 277, 280-82 (2d Cir.), *cert. dismissed sub nom. Pittsburgh Corning Corp. v. Simpson*, 111 S. Ct. 27 (1990); *Dunn v. Owens-Corning Fiberglas*, 774 F. Supp. at 946. This Court has properly refused to entertain objections to punitive damage awards based on vague appeals to constitutional principles. *See, e.g., Bankers Life and Casualty Co. v. Crenshaw*, 486 U.S. 71 (1988).

The Petition fails to specify the evidence relevant to the constitutional issues that was excluded or the erroneous ruling on its exception to the constitutionality of the instruction, contrary to Supreme Court Rule 14.1(h):

> If review of a judgment of a state court is sought, the statement of the case shall also specify the stage in the proceedings, both in the court of first instance and in the appellate courts, at which the federal questions sought to be reviewed were raised; the method or manner of raising them and the way in which they were passed upon by those courts; and such pertinent quotation of specific portions of the record or summary thereof, with specific reference to the places in the record where the matter appears (e.g., ruling on exception, portion of court's charge and exception thereto, assignment of errors) as will show that the federal question was timely and properly raised so as to give this Court jurisdiction to review the judgment on a writ of certiorari. When the portions of the record relied upon under this subparagraph are voluminous, they shall be included in the appendix referred to in subparagraph .1(k) of this Rule.

OCF's Statement of the Case fails to specify how it raised the constitutional issues at trial for a simple reason: it did not do so. Thus, this Court should deny the Petition under Rule 14.5.

OCF has also failed to show that the post-trial review by the trial courts offended due process. OCF omits from its discussion of post-trial review any mention of a hearing at which the courts rendered a decision from the

bench on OCF's post-trial motions. The reason the decision on the record appears "cursory" is simple: a court reporter was present at the hearing, but OCF never ordered the transcript and has failed to include it in the record before this Court.

With respect to appellate review, OCF's argument boils down to a single complaint: the West Virginia Supreme Court did not render a written decision on its Petition for Appeal to that court. OCF itself recognizes the reason: the West Virginia Supreme Court, like this Court, does not accept an appeal if the alleged error was not preserved below. (Petition at 36 [citing *Pote v. Jarrell*, 186 W. Va. 369, 412 S.E. 2d 770, 777 (1991)]).[4]

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[4] This Court has repeatedly recognized in the criminal context that due process does not establish an absolute right to an appeal in the state court system. *See, e.g., United States v. MacCollom*, 426 U.S. 317, 323 (1976) (citing *Griffin v. Illinois*, 351 U.S. 12, 18 (1956)). *See also Pennsylvania v. Finley*, 481 U.S. 551, 557-58 (1987); *Billotti v. Legursky*, 975 F.2d 113 (4th Cir. 1992) (reviewing West Virginia appellate procedures). Certainly, due process is not implicated in the civil context when the complaining party had every opportunity to present relevant evidence and to build and preserve a record, and in fact does receive review by the appellate court, which simply found no basis to render a written decision setting forth its reasons for refusing OCF's petition.

OCF cites a number of cases for the proposition that "the demands of due process require that the reasons for a decision be explained in certain circumstances." (Petition at 40 n.6). Certainly, if there is no right to appeal, there is no right to a written decision on the merits by the appellate court. Further, the cases cited by OCF in fact hold that:

> there is no federal requirement that a state trial judge explain his reasons for acquitting a defendant in a state criminal trial; . . .

As stated in *Garnes*, a petition for review must address each and every factor to be given to the jury "with particularity, summarizing the evidence presented to the jury on the subject or to the trial court at the post-judgment review stage." Syl. Pt. 5, *Garnes*, 413 S.E.2d at 900. OCF's petition could not have summarized evidence it did not present, and that court wisely declined to review a case submitted on an inadequate record. The fact that OCF's petition to the West Virginia Supreme Court "addressed some of the factors made relevant by *Haslip* (and later by *Garnes*)" (Petition at 37) is no substitute for introducing relevant evidence at the trial court level.[5]

> . . . Federal judges have no general supervisory power over state trial judges; . . . .

Harris v. Rivera, 454 U.S. 339, 344-45 (1981). OCF cites two cases that require corrections officials to provide written explanations for their decisionmaking. *Wolff v. McDonnell*, 418 U.S. 539, 564-65 (1974) (written record of disciplinary action by corrections officials required to aid scrutiny by state officials, the public and the courts); *Morrissey v. Brewer*, 408 U.S. 471, 489 (1972) (written statement by factfinders as to reasons for revoking parole). These cases are inapplicable to the instant cases where a complete record of the trial is available and OCF had the opportunity to create the record and submit any part of it for the consideration of the appellate court. OCF received all the process to which it was due.

[5] Further, even if the record adequately preserved the issue, OCF misstates the holding of *Pote v. Jarrell*, which explicitly does not require that every petition concerning punitive damages be accepted:

> Moreover, even where a punitive damage issue is adequately preserved, we may conclude in our review of the petition that the error was harmless and refuse the petition. We want to emphasize that merely

By OCF's own admission, it forewent the opportunity to present at trial any relevant evidence of the numbers of asbestos cases pending against it and any financial impact, but awaited its petition for appeal to the West Virginia Supreme Court and the Petition to this Court to present "data" (which is not even in the form of admissible evidence) that it wished the jury to consider in mitigation of punitive damages. An appellate court is not the proper forum for resolving factual disputes that could have been, but were not presented to the fact finder.

The West Virginia Supreme Court has properly rejected the role of a super fact finding body. In *Davis v. Celotex, supra,* an appeal to the West Virginia Supreme Court from an award of punitive damages against an asbestos defendant, the court concluded:

> In sum, we hold that in cases tried before *Garnes* in which punitive damages were awarded, we will not set aside such awards if there is a factual basis for the punitive damages, if the punitive damages bear a reasonable relationship to the compensatory damages, and if the parties' main assignment of error is that the trial court's instruction did not contain all of the factors enunciated in *Garnes*.

Davis, 420 S.E.2d at 567.

This Court should do likewise. The evidence of OCF's egregious conduct was substantial, and OCF had

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because error relating to a punitive damage award is asserted in the petition, that appeal will not automatically be granted on the punitive damage point alone.

Pote v. Jarrell, 412 S.E.2d at 777.

the opportunity, which it declined, to present all relevant evidence, to object to the jury instructions and to offer specific instructions to address any purported constitutional infirmity. The trial courts entertained motions and held a post-trial hearing on OCF's objections to the punitive damages award, but OCF failed to order a transcript of the hearing which specifically addressed OCF's contentions. Given the record, OCF presented no basis for the West Virginia Supreme Court to review the punitive damage awards. OCF, like other asbestos defendants who have petitioned this Court, had all the process to which it was due.

II. The Petition Presents No Basis Upon Which This Court Can Conclude That Multiple Punitive Damage Awards Exceed The Amount Necessary For Deterrence and Punishment.

OCF adopts the argument that multiple punitive damages violate due process as set forth in Owens-Illinois' Petition for A Writ of Certiorari in *Owens-Illinois, Inc. v. Bolyard*, 61 U.S.L.W. 3352 (U.S. Nov. 9, 1992) (No. 92-360). This Court denied Owens-Illinois' Petition and should do so here for the following reasons.

First, OCF presented no evidence to the trial courts that it was punished enough, and should not be permitted to do so here. OCF's assertion that it "informed the [West Virginia] Supreme Court of Appeals that 12 juries had returned punitive damages verdicts against OCF" does not substitute for the introduction of admissible evidence to the fact finder. Even if that information were true, it does not establish that OCF actually *paid* punitive

damages, or illustrate the financial implications of the information. OCF cannot expect this Court to simply accept as fact information presented out of context that has not been subjected to the rigors of cross-examination.

Further, the record is devoid of any indication that the jury had evidence of the full extent of OCF's wrongful conduct in failing to warn all users of the dangers of its asbestos products, and the jury was not instructed to award punitive damages as appropriate punishment for the totality of OCF's conduct. There was no showing that the wrongdoing sought to be punished in these cases is the same misconduct involved in other cases. In fact, there was no evidence at all relevant to multiple punitive damages. *Simpson*, 901 F.2d at 281. Without a full airing of these issues at the trial court level, there is nothing for this Court to review.

Second, punitive damage awards are governed by state law. The West Virginia Supreme Court has upheld the propriety of multiple punitive damages under precisely the same facts as are presented in this case. *Davis v. Celotex, supra*.

Third, in the criminal context, West Virginia has recognized that when a single act results in multiple deaths, Article III, Section 5 of the West Virginia Constitution permits multiple punishments, and criminal defendants may receive as many sentences as there were deaths. *State v. Fortner*, 182 W. Va. 345, 387 S.E.2d 812, 826 (1989); *State ex rel. Lehman v. Strickler*, 174 W. Va. 809, 329 S.E.2d 882 (1985); *State v. Myers*, 171 W. Va. 277, 298 S.E.2d 813 (1982). Certainly in the civil context, when a manufacturer's product causes death and injury to many people,

multiple punitive damage awards are proper. *See also Browning-Ferris Indus. of Vermont, Inc. v. Kelco Disposal, Inc.*, 492 U.S. at 259-60 (Excessive Fines Clause of the Eighth Amendment does not apply to punitive damages awarded in civil cases between private parties); *United States v. Halper*, 490 U.S. 435, 450-51 (1989) (Double Jeopardy Clause of Fifth Amendment is not triggered by civil litigation between private parties).

Fourth, this argument repeatedly has been raised in asbestos cases appealed to this Court, including an appeal by another defendant in these cases. *See Keene v. Adams, supra*. In every case, this Court properly declined review. *See, e.g., Glasscock v. Armstrong Cork Co., supra; King v. Armstrong World Indus., Inc.*, 906 F.2d 1022 (5th Cir. 1990), *cert. denied sub nom., Celotex Corp. v. King*, 111 S. Ct. 2236 (1991); *Simpson v. Pittsburgh Corning Corp., supra; Johnson v. Celotex Corp.*, 899 F.2d 1281 (2d Cir.), *cert. denied sub nom. Celotex Corp. v. Johnson*, 111 S. Ct. 297 (1990); *Jackson v. Johns-Manville Sales Corp.*, 781 F.2d 394 (5th Cir.), *cert. denied*, 478 U.S. 1022 (1986).

Fifth, to adopt OCF's position as a matter of law without a full record raises disturbing practical implications. If only a single punitive damage award is available against a manufacturer who mass produces and markets unsafe products, manufacturers could simply factor the cost of a single punitive damage award into the cost of doing business, completely eliminating the deterrent effect of punitive damages. *See Leonen v. Johns-Manville Corp.*, 717 F. Supp. 272, 283-84 (D.N.J. 1989).

Thus, to reverse the punitive damages in this case would require this Court to become a fact finding body

and to completely undermine the purposes of punitive damages under state law.

CONCLUSION

Having failed to avail itself of the opportunity at trial to present relevant, admissible evidence in mitigation of punitive damages, OCF now seeks to transform this Court into a fact finding body to consider for the first time OCF's "information." The evidence of OCF's wrongdoing was overwhelming, and the punitive damages awarded against OCF comport with applicable state law. OCF presents no basis for review of punitive damages, and this Court must deny OCF's Petition for a Writ of Certiorari.

Respectfully submitted,

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Dated: November 20, 1992

RULES OF APPELLATE PROCEDURE
WEST VIRGINIA SUPREME COURT OF APPEALS

Rule 3. Petition for Appeal. (a) *Time for Petition.* No petition shall be presented for an appeal from, or a writ of supersedeas to, any judgment, decree or order, which shall have been rendered more than four months before such petition is filed in the office of the clerk of the circuit court where the judgment, decree or order being appealed was entered, whether the State be a party thereto or not; provided, that the judge of the circuit court may for good cause shown, by order entered of record prior to the expiration of such period of four months, extend and re-extend such period, not to exceed a total extension of two months, if a request for the transcript was made by the party seeking an appeal or supersedeas within thirty days of the entry of such judgment, decree or order. In appeals from administrative agencies, the petition for appeal shall be filed within the applicable time provided by the statute.

(b) *Notice for Criminal Appeal.* No petition from a criminal case shall be presented unless a notice of intent to appeal shall have been filed with the clerk of the court in which the judgment or order was entered within thirty days from the entry of such judgment or order. The notice of intent to appeal shall concisely state the grounds for appeal.

(c) *Form of Petition.* The petition for appeal and note of argument under prior practice shall be integrated into one document called the petition. A petition for an appeal shall state the following in the order indicated:

1. The kind of proceeding and nature of the ruling in the lower tribunal.

2. A statement of facts of the case.

3. The assignments of error relied upon on appeal and the manner in which they were decided in the lower tribunal.

4. Points and authorities relied upon, a discussion of law, and the relief prayed for.

(d) *Joint or Consolidated Appeals.* If two or more persons are entitled to appeal from a judgment or order of a lower tribunal and their interests are such that joinder may properly be made, they may join in petitioning for an appeal, and they may thereafter proceed on appeal as a single appellant. Appeals may be consolidated by order of the Supreme Court upon its own motion, or upon motion of a party, or by stipulation of the parties to the several appeals.

(e) *Service of Petition.* The petition for appeal shall be served in accordance with Rule 15.

(f) *Response to Petition.* When the appeal is from a judgment, order or decree of a circuit court, the respondent may file seven copies of a response with the Clerk of the Supreme Court within thirty days after the filing of the petition for appeal in the office of the clerk of the circuit court. When the appeal is from another tribunal, the respondent may file seven copies of a response with the Clerk of the Supreme Court within thirty days after the filing of the petition for appeal with the Clerk of the Supreme Court. (As amended by order entered November 29, 1989, effective January 1, 1990, by order entered

June 26, 1990, effective July 1, 1990, and by order entered December 13, 1990, effective March 1, 1991.)

Rule 4. Presentation of Petition. (a) *Filing with Clerk.* When the appeal is from an order of the circuit court, eight copies of the petition for appeal shall be filed in the office of the clerk of the circuit court where the judgment, decree or order being appealed was entered. The circuit clerk shall note on each copy the date on which the petition for appeal was filed. There shall be attached to the original petition a memorandum of all parties who have appeared in the action from which the appeal is sought, together with the names and addresses of their counsel of record, if any.

(b) *Transmission to the Supreme Court.* The circuit clerk shall retain one copy of the petition and, within twenty days from deposit of money or bond for costs under subparagraph (d), shall transmit seven copies of the petition, along with the trial court record as designated in paragraph (c), to the Clerk of the Supreme Court by United States certified mail.

(c) *Record on Petition.* The appellant shall designate by itemization to the clerk of the circuit court such pleadings, orders and exhibits to enable the Supreme Court to decide the matters arising in the petition:

(i) In lieu of filing all or part of the transcript of testimony the petitioner may file under Rule 4A, in which event he may rely on the facts stated in his petition, or

(ii) If the petitioner desires he may cause to be prepared, pursuant to the provisions of Rule 80 of the West Virginia Rules of Civil Procedure, a transcript of such part of the proceedings not already on file as he deems necessary for inclusion in the record.

The circuit clerk, before transmitting the record to the Supreme Court, shall arrange the papers, as nearly as possible, in chronological order of filing, shall number the pages, shall make and certify copies of all orders entered in the case which are not in the files, and shall prepare a table of contents or index.

(d) *Bond for Costs.* Before such petition and record are transmitted, the petitioner shall deposit with the clerk of the circuit court sufficient money, or a bond conditioned to pay the same, in a penalty and with sureties to be fixed and approved by such clerk, to pay: (1) the expenses of preparing and indexing the record; (2) fees for filing the petition and certifying necessary copies of orders; (3) costs of transmission and return of the record; and (4) costs of the making of the transcript. The clerk shall endorse on the petition that such deposit has been made or such bond fixed. (As amended by order entered November 29, 1989, effective January 1, 1990.)

Rule 4A. Presentation of Petition Without Transcript of Testimony. (a) *Purpose.* In order to provide an inexpensive and expeditious method of appeal, a petitioner may file his petition without the transcript of testimony taken in the lower court.

(b) *Filing with Circuit Court.* Eight copies of the petition shall be filed in the office of the clerk of the circuit where the judgment or order being appealed was entered within sixty days from the date of entry of the judgment of order. Two additional copies of the petition shall be served upon each party to the action being appealed, as provided in Rule 15, and such parties shall have thirty days to file a reply petition with the clerk of the circuit court. The respondent shall not be entitled to an oral argument under rule 5.

(c) *Record on Petition.* The petitioner shall designate by itemization to the clerk of the circuit court so much of the pleadings, orders and exhibits in the case as will enable the Supreme Court to decide the matters arising in the petition. In lieu of filing all or part of the transcript of testimony, the petitioner shall set out in the petition a statement of all facts pertinent to the issues he raises. The petition shall include a certificate by the petitioner's attorney that the facts alleged are faithfully represented and that they are accurately presented to the best of his ability. The use of the abbreviated procedure, set forth in this Rule 4A, places the highest possible fiduciary duty upon a lawyer with regard to the court and intentional misrepresentation of any sort is grounds for disciplinary action.

(d) *Transmission to the Supreme Court.* The circuit clerk shall retain in his office one copy of the petition. He shall, at the end of thirty days from the date the petition was filed under paragraph (b), supra, or after respondent has filed a reply petition, whichever occurs first, transmit by certified mail to the Clerk of the Supreme Court seven

copies of the petition. The circuit clerk, before transmitting the record to the Supreme Court, shall arrange the papers, as nearly as possible, in chronological order of filing, shall number the pages, shall make and certify copies of all orders entered in the case which are not in the files, and shall prepare a table of contents or index.

(e) *Bond for Costs.* Before such petition and record are transmitted to the Supreme Court, the petitioner shall deposit with the clerk of the circuit court sufficient money, or a bond conditioned to pay the same, in a penalty and with sureties to be fixed and approved by such clerk, to pay: (1) the expenses of preparing and indexing the record; (2) fees for filing the petition and certifying necessary copies of orders; (3) costs of transmission and return of the record. The clerk shall endorse on the petition that such deposit has been made or such bond filed.

Rule 5. Hearing on Petition. (a) *Time for Hearing.* Within thirty days from the date of receipt of the petition and record by the Clerk of the Supreme Court, counsel may request oral presentation on the petition on any regularly scheduled motion day thereafter. Such request shall be made to the Clerk of the Supreme Court in writing or by telephone. Oral presentation will be heard in the order in which such requests were made. Oral presentation will not be heard, except upon motion for good cause shown, prior to expiration of the period allowed for filing a response as provided in Rule 3(f).

(b) *Oral Presentation.* Oral presentation shall be limited to ten minutes, unless additional time is granted by the Court.

(c) *Waiver of Oral Presentation.* At any time after the transmission of the petition and record to the Clerk of the Supreme Court in accordance with Rule 4A(d), counsel may inform the Clerk in writing that an oral presentation is not desired, in which case the petition will be considered by the Court in chambers. (As amended by order entered December 13, 1990, effective March 1, 1991.)

* * *

Rule 7. Rejection or Allowance of Appeal. (a) *Rejection.* If the petition for appeal is rejected by the Supreme Court on the ground that the judgment or order is plainly right, no other petition for appeal from that judgment or order shall be permitted. If the petition for appeal is rejected on any other ground, or if no ground be cited in the rejection, the petitioner may renew the petition as many times as he desires during the period prescribed by law for presentation of petitions.

(b) *Renewal of Petition.* A petitioner desiring to renew a petition may notify the Clerk of the Supreme Court of his intention in writing within thirty days after the entry of the order denying his application. In such case, the Clerk shall retain the petition and record in the Supreme Court, the petition may be reheard in accordance with Rule 5, and an amended petition or supplemental argument may be filed.

If the Clerk of the Supreme Court receives no timely notice of the petitioner's intention to renew, he shall return the record to the circuit clerk, who shall repay the petitioner any money deposited under Rule 4(d) or Rule 4A(e), in excess of fees and expenses.

(c) *Allowance.* If the petition for appeal is granted:

(1) The Clerk of the Supreme Court shall docket the same and immediately send a copy of the order granting the appeal to the petitioner's counsel, or, if there is no counsel of record, to the petitioner, and to the clerk of the circuit court, who shall retain the same in his records.

(2) The Clerk of the Supreme Court shall forthwith return the record to the clerk of the circuit court for preparation of the record of the case for appeal in accordance with Rules 8 and 9.

(3) The Clerk of the Supreme Court shall then issue summons against all parties appearing of record, other than the petitioner, that they may be heard, and shall also issue any supersedeas which may have been awarded. The Clerk of the Supreme Court shall serve the summons upon the parties by mailing the same to the counsel of record for each party, or if there is no counsel of record, to the party at his last known address. Service shall be complete upon mailing. The Clerk of the Supreme Court shall note upon the docket the names of the parties to whom the summonses were mailed, with the date of mailing.

(4) The Court may grant a supersedeas or modify the conditions thereof, in accordance with rule 6.

IN THE CIRCUIT COURT OF
MONONGALIA COUNTY, WEST VIRGINIA

LEONARD ADAMS, GARLEN BURTON, GEORGE & BARBARA CAMPBELL, LESLIE CARR, JOHN & CAROLYN CHAPMAN, ARVILLE DALTON, JAMES DARRAH, PAUL & BONNIE DUNN, TERRY ENGLAND, WILLIAM GABBERT, GEORGE HOSCHAR, EVERETT JOHNSON, JAMES & LOIS KIRK, WILLIAM KITTLE, FOSTER LIPSCOMB, NELSON LOTT, G.V. MEHALIC, JERYL ROOT, STANLEY ROWE, JOSEPH SBERNA, AND JOSEPH SHILOT,

Plaintiffs

v.

KEENE CORPORATION and OWENS-CORNING FIBERGLAS CORPORATION,

Defendants

CIVIL ACTION NOS. 86-C- 763, 764, 783, 830, 831, 832 & 87-C-7

ASBESTOS CASES

DEFENDANT OWENS-CORNING FIBERGLAS CORPORATION'S OBJECTIONS AND EXCEPTIONS TO JUDGE'S CHARGE TO JURY

Filed On Behalf of:
Owens-Corning Fiberglas Corporation, Defendant

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Firm No. 854

DEFENDANT OWENS-CORNING FIBERGLAS CORPORATION'S OBJECTIONS AND EXCEPTIONS TO JUDGE'S CHARGE TO JURY

AND NOW comes Defendant, Owens-Corning Fiberglas Corporation, by its attorneys Riley & DeFalice, P.C. and files its Objections and Exceptions to Judge's Charge to Jury, as follows:

1. The Honorable Court failed to charge that it was a jury question as to whether a Defendant's efforts to warn of a product's alleged danger were adequate.

2. The Honorable Court failed to charge that Plaintiffs' damages could be reduced or eliminated as a result of their alleged injuries being caused in whole or in part by smoking or causes other than asbestos related injuries.

3. The Court incorrectly charged that the issue of product defect was decided as a matter of law against this Defendant (Jury Charge; page 9, line 19 to page 10, line 1).

4. The Court incorrectly charged that the Plaintiffs could not be charged with contributory negligence or comparative fault (Jury Charge; page 10, line 1 to line 6)

5. The Court incorrectly charged that *all* acts of negligence, acts which were willful and wanton or omissions to act done by officers, agents or employees of a corporation were deemed to be the acts of the corporation (Jury Charge; page 15, line 19 to page 16, line 1).

6. The Court's instruction concerning the acts or failures to act by corporate officers, agents or employees was unfairly prejudicial to this Defendant, since it combined principles of compensatory and punitive liability,

such that the jury was confused as to whether it could award punitive damages based on alleged conduct which was merely negligent in nature (Jury Charge; page 15, line 19 to page 16, line 1).

7. The Court erroneously instructed on the issue of punitive damages. (Jury Charge; page 13, line 7 to page 14, line 3)

DISCUSSION

I. FAILURE TO CHARGE ON ISSUE OF ADEQUACY OF WARNING

This Honorable Court failed to charge the jury concerning warnings issued by defendant Owens-Corning Fiberglas Corporation (hereinafter "OCF" or "Owens Corning"). The West Virginia Supreme Court of Appeals stated in the case of *Morningstar v. Black & Decker Mfg. Co.*, 162 W.Va. 857, 253 S.E.2d 666, 682-683 (1979), that "product unsafeness is to be tested by what the reasonably prudent manufacturer would accomplish in regard to the safety of the product having in mind the general state of the art of the manufacturing process, including design, labels, and warnings, as it relates to the economic costs, at the time the product was made." After quoting this language from *Morningstar,* the Court in *Ilosky v. Michelin Tire Corp;* 307 S.E.2d 603, 611 (W.Va. 1983), concluded that "the determination of whether a defendant's efforts to warn of a product's dangers are adequate is a jury question."

In addition, the placement of a warning on packages will impact the defendant's potential liability for punitive

damages. In *Ilosky*, the Supreme Court of Appeals ruled that the trial court had correctly struck the plaintiff's claim for punitive damages because the evidence had shown that Michelin took steps to warn the public concerning the hazard claimed. The warnings consisted of warnings and recommendations distributed to consumers and dealers. The Court reasoned that even though the warnings may have been inadequate to fully warn, the act itself indicates some effort by the manufacturer. Such an effort precluded a finding of willful, wanton or malicious conduct.

During the course of the trial, evidence was presented showing warnings by Owens-Corning. The Court's failure to instruct concerning warnings was therefore erroneous. Given the significance of this issue, the failure to instruct was not harmless error.

II. FAILURE TO CHARGE ON SMOKING OR OTHER CAUSES

During the course of the trial, evidence was presented showing the extensive smoking histories of most of the Plaintiffs. In addition, evidence was presented by medical experts concerning the nexus of smoking and lung disease. In addition, as to some Plaintiffs, medical evidence was presented concerning the presence of medical conditions which could adversely impact the Plaintiff's breathing. In spite of this evidence, the Court failed to instruct the jury that in making its determination, it could take into account these other factors.

Comparative fault or negligence is available as to a defense in a strict liability products liability action, so

long as the complained of conduct is not a failure to discover a defect or to guard against it. *Star Furniture Co. v. Pulaski Furniture Co.*, 297 S.E.2d 854, 863 (W.Va. 1982). The cited case also stands for the proposition that a plaintiff can recover in strict liability only for those injuries actually caused by the product defect (*Id.* 297 S.E.2d at 859)

Clearly, the Court's failure to instruct concerning smoking and/or other health problems was erroneous. Evidence supporting these defenses was introduced by the defendants and created a jury question. Even under strict liability, the product defect must be shown to be the proximate cause of the plaintiff's injuries. *Morningstar,* 253 S.E.2d at 680. Strict liability is not absolute liability. Therefore, the Court should have instructed concerning other possible causes for Plaintiffs' alleged injuries.

III. DIRECTED VERDICT ON PRODUCT DEFECT

The Court ruled as a matter of law that OCF's asbestos containing products were defective. In its instruction, the Court correctly stated that the question of product defect is usually one for the jury's determination. *See generally, Morningstar; Ilosky.*

The standard for directing a verdict on liability is found in Syllabus Points 4 and 5 of *Sommerville v. Pennsylvania Railroad Co.*, 151 W.Va. 709, 155 S.E.2d 865 (1967) wherein the Supreme Court of Appeals stated:

> "4. When the material facts are undisputed and reasonable men can draw only one conclusion from them, the question of negligence is a question of law for the Court.

> "5. Where the evidence given on behalf of the defendant is clearly insufficient to support a verdict for him so that such verdict, if returned by a jury, must be set aside, and the evidence of the plaintiff is clear and convincing, it is the duty of the trial court, when so requested, to direct a verdict for plaintiff."

This standard was recently approved and applied in the case of *King v. Kayak Manufacturing Corporation*, 387 S.E.2d 511 (W.Va. 1989). In *King*, a diver brought a product liability suit against a swimming pool manufacturer. Plaintiff became quadriplegic when he dove into one of Kayak's above-ground pools. The Supreme Court of Appeals identified the central issue of the case as being the trial court's finding that plaintiff as a matter of law was entitled to a directed verdict, in spite of contrary evidence of contributory negligence and assumption of the risk (*Id.* 387 S.E.2d at 520).

The Supreme Court of Appeals reversed the lower court's directed verdict, noting that several material factual disputes existed. Evidence adduced by defendant showed that in addition to knowing the depth of the pool, plaintiff had elected to dive into the pool with his arms at his side, rather than overhead. This would result in a deeper dive in the shallow water. The court determined that the jury could reasonably have concluded that Plaintiff had actual knowledge of the risk of serious injury.

The Court completed its analysis by quoting Syllabus Point 2 in the case of *Ventura v. Winegardner*, 357 S.E.2d 764, (W.Va. 1987), which stated:

> Where [in a trial by jury] there is competent evidence tending to support a pertinent theory in the case, it is the duty of the trial court to give an instruction presenting such theory when requested to do so. *McAlister v. Weirton Hospital Co.*, ___ W.Va. ___, 312 S.E.2d 738, 744 (1983) (citation omitted) [in original] Syl. pt. 2 *Brammmer* [sic] *v. Taylor*, ___ W.Va. ___, 338 S.E.2d 207 (1985).

The reasoning of the *King* case would appear to be applicable in the instant action. The Court here *sua sponte* directed a verdict on product defect following presentation of defendant's evidence. OCF had presented testimony showing state of the art consisting of the following witnesses: Robert Peele; W. Keith Morgan, M.D.; Samuel Schillaci; Jerry Helser; Edward Gensler, M.D.; Willis Hazard; and Gerrit Schepers, M.D. (cross examination).[1] In addition, on the issue of product defect, OCF's evidence included exhibits from Mr. Peele's testimony. Although OCF believes that this evidence was sufficient to support a verdict in its favor, at a minimum (arguendo) it was competent evidence sufficient to support a pertinent theory in the case. In order to sustain a request for a jury instruction concerning product defect, only the minimal showing of competent evidence was required. OCF clearly met that standard. OCF would also note for the Court that West Virginia juries have rendered verdicts

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[1] OCF believes that it is particularly significant that it developed significant evidence favorable to its position on product defect/state of the art through Plaintiffs' own state of the art witness, Dr. Schepers. The evidence developed in his cross-examination should, alone, have required submission of the product defect issue to the jury.

against Plaintiffs based on the same product defect evidence submitted by these Plaintiffs. It is apparent, based both on the case law and facts that the Court erred in instructing the Jury that product defect was determined as a matter of law against OCF.

IV. FAILURE TO INSTRUCT AS TO AVAILABILITY OF DEFENSES OF CONTRIBUTORY NEGLIGENCE OR COMPARATIVE FAULT

The Court instructed, as a matter of law, that the defenses of contributory negligence and comparative fault were not available to OCF. Based on *Star Furniture* and *King*, discussed previously, the law of West Virginia is clear that these defenses should be available to defendants involved in a strict liability, products liability case. Since OCF has discussed this issue previously in this document, rather than restating its arguments, it incorporates its previous discussion herein by reference.

V. ACTS OF CORPORATE OFFICERS, AGENTS AND EMPLOYEES

The Court instructed that all acts or failure to act by corporate officers, agents or employees (hereinafter "employees") are held by law to be the acts of the corporation. This statement is an incorrect summary of the law of West Virginia, in that it is overly broad. OCF asserts that West Virginia law holds that not all acts of employees may be imputed to the corporation.

For instance, the Supreme Court of Appeals has ruled that: a corporation is not ordinarily chargeable with the

information held by an officer which it was in his interest to conceal; *Lawhead v. Stewart*, 122 W.Va. 80, 7 S.E.2d 350, 351 (1940); a false statement of an agent of a corporation in making a contract does not bind the corporation, where the act is not within the scope of his authority; *McDonald v. Cole*, 46 W. Va. 186, 32 S.E. 1033, 1034 (1899); the act of officers and agents in making a dedication of property, without authority from the directors, will not make valid a dedication unless it is expressly or implicitly ratified by the corporation; *Hast v. Piedmont & C.R. Co.*, 52 W. Va. 396, 44 S.E. 155 (1903); notice to individual directors of matters not within the scope of their authority is not considered notice to the corporation; *Mack Realty Co. v. Beckley Hardware & Supply Co.*, 107 W.Va. 290, 148 S.E. 122, 123 (1929).

In West Virginia cases decided by the Fourth Circuit Court of Appeals, similar results have occurred. The court has decided that a corporation should not be required to pay punitive damages unless a showing is made of the agent's authority or ratification by the principal of the alleged wrongs. *Great Atlantic and Pacific Tea Co. v. Lethcoe*, 279 F.2d 948 (4th Cir. 1960). *See also England v. American Southern Insurance Company*, 380 F.2d 137 (4th Cir. 1967); *Ohio Farmers Indemnity Co v. Charleston Laundry Co.*, 183 F.2d 682 (4th Cir. 1956).

These cases consistently stand for the proposition that the Court's instruction in this case was overly broad. Certainly all acts of employees may not be imputed to the corporation pursuant to West Virginia law. Any act outside the scope of authority of the employee may not be imputed to the corporate principal. By framing the instruction so broadly, the Court unfairly prejudiced OCF.

VI. CONFUSING JURY CHARGE

The instruction discussed in the previous section is the source of a second objection by OCF. As phrased, the charge is confusing, in that it combines principles of both compensatory and punitive damages in one charge. By speaking of negligent, wanton, willful, and malicious corporate acts within the same sentence, OCF asserts that it was unfairly prejudiced. The phrasing of the instruction was such that the jury obviously believed that it could award punitive damages on the basis of negligent conduct only.

In West Virginia, where gross fraud, malice, oppression, or wanton, willful or ruthless conduct, or criminal indifference to civil obligations affecting the rights of others appears, the jury may assess punitive or vindictive damages, *Wells v. Smith*, 297 S.E.2d 872 (W.Va. 1982). *Cook v. Hecks Inc.*, 342 S.E.2d 453, 461 (W.Va. 1986). This standard is obviously much more strict than that which exists for a negligence finding. *See, Adair v. Huffman*, 156 W.Va. 592, 195 S.E.2d 739 (1973) *cert. denied* 348 U.S. 981 (1955), *rehrg. denied* 349 U.S. 924 (1955). Under the *Wells* standard, acts amounting to negligence will not support a finding of punitive damages. *See, Ilosky, supra.* However, by placing the negligence and punitive language sequentially in a single sentence, the jury here was misled into believing that mere negligent acts would support a punitive finding.

Under the law of West Virginia, the court should refuse to give an instruction which tends to be incomplete or misleading *Koontz v. Long*, 384 S.E.2d 837, 842 (W.Va.

1989). Such an instruction is erroneous *Catlett v. MacQueen*, 375 S.E.2d 184 (W.Va. 1988). *Cross v. Trapp*, 294 S.E.2d 446 (W.Va. 1982). In addition, where an instruction is susceptible to two constructions, one of which is erroneous, and which may, therefore, mislead the jury, it should not be given. *McGlone v. Superior Trucking Co. Inc.*, 363 S.E.2d 736, 745 (W.Va. 1987). *See also Gilliam v. Yeates*, 329 S.E.2d 51, 52 (W.Va. 1985).

In the *Koontz* case, the Supreme Court of Appeals was faced with a jury instruction in a case involving ownership of funds in a decedent's certificates of deposit. The issues were whether the evidence was sufficient to support the conclusion that a fiduciary relationship existed between a niece and one holder and whether the holders intended to make a bona fide gift of the funds to the niece. In rejecting the proposed instruction of appellant, the Court stated:

> As already discussed, under the law of West Virginia, fraud, mistake, or certain other inequitable circumstances, including the mere existence of a fiduciary relationship between the joint parties on an account, may overcome the presumption of a gift in the registration of the account. The existence of a fiduciary relationship is not necessarily a circumstance equal to or in the nature of fraud or mistake. In that the appeallant's [sic] Instruction No. 8 failed to include the existence of a fiduciary relationship as a specific ground which might obviate the presumption of a gift, and in that it suggested that before such a relationship could be considered as a factor obviating the presumption of gift it had to rise to the level of ordinary fraud or mistake, as opposed to constructive fraud,

> this Court believes that his instruction tended to be an incomplete and misleading statement of the law. Such an instruction may properly be refused by a trial court. (Citations omitted) (384 S.E.2d at 842.)

Owens-Corning believes that the present circumstances are similar to those found in *Koontz*. The misleading aspect in both cases involves the degree of conduct necessary to meet a legal standard. In both cases, the jury confusion occurs as a result of the jury's application of the wrong legal standard to the facts. Since it is likely that this jury was misled into believing that it could award punitive damages based on merely negligent conduct, the instruction was erroneous.

VII. IMPROPER INSTRUCTION ON PUNITIVE DAMAGES

Owens-Corning asserts that the jury should not have been instructed concerning punitive damages, based upon the evidence submitted to the jury.

Punitive damages are permitted as a means of punishing a defendant for egregious conduct *Wells v. Smith, supra*. The type of conduct which will support an award of punitive damages has been set forth in the previous section.

The evidence presented to the jury clearly proved that in December, 1966, OCF placed warning labels on the asbestos-containing product identified during the course of the trial. Having proved that it warned, OCF should not be liable for punitive damages, based on the Supreme Court of Appeals' decision in the *Ilosky* case.

After setting forth the principle that punitive damages are awardable to punish for willful, wanton and other aggravated conduct, the *Ilosky* court went on to sustain the trial court's decision to strike the plaintiff's punitive damage claim, stating:

> The trial court correctly struck the appellee's claim for punitive damages. The evidence showed that Michelin had taken steps to warn the public about mixing radial and conventional tires. These efforts included placing warnings and recommendations against such action in literature distributed to consumers and to individual dealers who carried Michelin brand tires. The fact that these warnings may have been inadequate to fully warn of the hazards of such use does not obviate the fact that Michelin made some effort. This case does not involve a situation where the manufacturer or distributor made no effort to warn about use of the product. Therefore, the facts do not meet the willfulness, wantonness, or malice standard. (307 S.E.2d at 619.)

The dictates of *Ilosky* clearly show that it was improper for the Court to instruct that punitive damages were awardable against OCF. The evidence proved that OCF warned. Under *Ilosky*, it is not relevant whether the warning was adequate, for purposes of removing the alleged product defect arising from a lack or warning. The act itself was sufficient evidence that OCF's conduct did not rise to the level of aggravation necessary to support such damages. It is apparent that the giving of

any instruction that punitive damages could be awarded, was clear error based on these facts.[2]

CONCLUSION

An erroneous instruction is presumed to be prejudical [sic], unless it appears that the complaining party was not injured by the giving of the instruction. Instructions must be based on the evidence. The giving of an erroneous instruction will warrant the award of a new trial. *Cato v. Silling*, 137 W.Va. 694, 73 S.E.2d 731 (1952). OCF asserts that the instructions noted (or the failure to give instructions) was erroneous and prejudical [sic] to OCF for the reasons stated herein.

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[2] OCF incorporates herein by reference the Objections and Exceptions to the Jury Charge filed by other similarly situated parties, to the extent they are not inconsistent herewith.